

# Grand Jury Abuse and Prosecutorial Misconduct... Avoiding Pitfalls

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# Avoiding Pitfalls: Grand Jury Practice

USAM 9-11.010: Prosecutor's function is “to ensure that justice is done and that guilt shall not escape nor innocence suffer.”

The Prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration...

# Avoiding Pitfalls: Grand Jury Practice

USAM 9-11.010: Prosecutor's function is “to ensure that justice is done and that guilt shall not escape nor innocence suffer.”

The Prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

# Judicial review of grand jury conduct

Judicial review of GJ proceedings is extremely limited (but not barred!) for several reasons.

- 1. Grand Jury is an independent body - not restricted by tech. rules of evidence & procedure.
- 2. Courts are reluctant to interfere with secret proceedings of GJ, esp. if investigation is open.

# Judicial review of grand jury conduct

Judicial review of GJ proceedings is extremely limited (but not barred!) for several reasons.

- 3. Courts are unwilling to impede the GJs law enforcement function by questioning its conduct.
- 4. Doctrine of separation of powers limits the court's ability to supervise the Executive Branch.

# Judicial Remedies for GJ Abuse

Judicial Review -

Based on Due Process OR Supervisory Powers?

- In extreme cases, where actual prejudice is established, Court may dismiss Indictment. See, *Bank of Nova Scotia v. U.S.*, 487 U.S. 250 (1988)
- Quashing Subpoenas or issuing protective orders

# Judicial Remedies for GJ Abuse

Judicial Review -  
Based on Due Process OR Supervisory  
Powers?

- Suppressing GJ testimony
- Expunging prejudicial language from Indictments
- Recommending DISCIPLINARY ACTION against Prosecutor for misconduct

# Categories of Grand Jury Abuse

- 1. Alleged inappropriate disclosure of grand jury information - Rule 6(e)
- 2. Unauthorized persons present, or participated, during grand jury proceedings.



# Categories of Grand Jury Abuse

- 3. Legal and ethical limitations on the use of the grand jury's subpoena power.
- 4. Presentation of cases before the grand jury (lots and lots of pitfalls...)

# 1. Inappropriate Disclosure of GJ info.

Disclosing “matters occurring before the grand jury”

- Disclosure may be punished as Contempt of Ct.
- Sanctions may include Dismissal of Indictment

# 1. Inappropriate Disclosure of GJ info.

Disclosing “matters occurring before the grand jury”

- Matters before a GJ may include
  - ▶ Identity of witnesses, jurors, questions by jurors
  - ▶ Summaries or Testimony of GJ witnesses
  - ▶ Subpoenaed documents (maybe/maybe not)
- Sentencing Memos: **SHOULD NOT** use info. received through GJ process

## 2. Unauthorized Persons in GJ process

Fed. R. Crim. P. Rule 6 (d)

- When deliberating and voting: ONLY JURORS
- When presenting a case: Jurors; Prosecutor(s); Witness (only one); interpreter; and Stenographer

## 2. Unauthorized Persons in GJ process

Fed. R. Crim. P. Rule 6 (d)

- DO NOT ALLOW: Students, Interns, Paralegals, or other govt. personnel into GJ Room
- IF INTRUSION HAPPENS: Stop proceeding; escort intruder out; obtain explanation; Put on record -what occurred & state that proceedings did not take place in presence of intruder

### 3. Subpoena Powers of Grand Jury

Purpose is to assist in investigating crimes

- GJ Subpoenas may not be used as trial preparation or as substitute for discovery against indicted def.
- Okay for GJ to issue subpoenas if investigating OTHER crimes associated with indicted def.

### 3. Subpoena Powers of Grand Jury

Purpose is to assist in investigating crimes

- GJ subpoenas may not be used to obtain evidence for use in civil proceedings. (ie., ACE and Administrative Forfeiture issues)

### 3. Subpoena Powers of Grand Jury

Purpose is to assist in investigating crimes

- Re-subpoenaing contumacious witness before successive GJ -requires approval by AAG, Crim.



### 3. Subpoena Powers of Grand Jury

Purpose is to assist in investigating crimes

- Miscellaneous Subpoena-related Issues

- ▶ Attorney testimony
- ▶ Use of fictitious subpoenas
- ▶ Locating fugitives
- ▶ Harassing witnesses

## 4. Presentations to Grand Juries

### Interrogation of witnesses

- Impugning character of defendant
- Insinuating guilt (conveying opinions)
- Misleading comments & questions
- Inflammatory and abusive remarks

## 4. Presentations to Grand Juries

Interrogation of witnesses

- Threats (inducing a change in testimony)
- Harassment
  - ▶ Badgering; commands of yes/no answers
  - ▶ Repetitive questions; prolonging interrogation
  - ▶ Denial of food, recess, or to speak with attorney

# **Presentations to Grand Juries**

## **Undermining Legal Safeguards**

- **Discrediting witness's reliance on rights**
- **Failing to advise witness of rights**
- **Subverting a grant of immunity**
- **Interfering with privileged relationships**
  - ▶ **Attorney-Client**
  - ▶ **Husband-Wife**
  - ▶ **Doctor-Patient**

# Presentations to Grand Juries

## Undermining Legal Safeguards

- Interfering with First Amendment rights
  - ▶ Weight of compelling state interest
  - ▶ Relationship of govt. interest and info. sought

# Presentations to Grand Juries

## Undermining Legal Safeguards

- Interfering with First Amendment rights
  - ▶ Weight of justified govt. goal vs impact on rights
  - ▶ Weight of harm shown by as result of disclosure
- Failing to record proceedings

# **Presentations to Grand Juries**

## **Illegitimate Use of Grand Juries**

- Interrogating already indicted defendant
- Trapping witness into perjury
- Stigmatizing one as “unindicted co-conspirator”
  - ▶ Using “John/Jane Doe” instead of real names
- Misuse of Grand Jury Reports (rare)

# Presentations to Grand Juries

Non-Disclosure of favorable evidence

- Supreme Court - Govt. has no obligation to present exculpatory evidence



# **Presentations to Grand Juries**

Non-Disclosure of favorable evidence

- **DOJ POLICY - USAM 9-11.233**
  - ▶ AUSA with personal knowledge, **MUST** present evidence that directly negates guilt of subject
  - ▶ Violation of USAM can result in OPR referral and Bar disciplinary referral

# **Presentations to Grand Juries**

Non-Disclosure of favorable evidence

- Use of Perjured Testimony & Credibility evidence
- Misleading Use of Hearsay
- Illegally obtained evidence (USAM 9-11.231)

# Presentations to Grand Juries

## Targets as Witnesses

- No legal duty to allow target to testify
  - ▶ USAM 9-11.152: Reasonable requests should be accommodated
- Voluntary appearance is preferred
  - ▶ Target subpoena requires USA approval

# Presentations to Grand Juries

## Targets as Witnesses

- Target MUST receive “Target Letter” w/rights
- Grand Jurors request for target testimony

# **Presentations to Grand Juries**

Prosecutor that undermines GJ independence

- Pre-signed Indictment
- Improper Legal Advice
- Prosecutor's personal opinion

# **Presentations to Grand Juries**

Prosecutor that undermines GJ independence

- Conflicts of interest
- Rushing GJ deliberations by limiting time
- Currying Favor - providing snacks, etc.

# Preventative Measures

A spoonful of sugar isn't going to cure GJ abuse....

- Caution Jurors that Prosecutor's statements and opinions are not evidence
- Take care when discussing prior criminal records, polygraph exams, and uncorroborated intelligence reports concerning target or witness

# Preventative Measures

A spoonful of sugar isn't going to cure GJ abuse....

- Tell GJ when evidence would be inadmissible at trial or of limited purpose or value
- Instruct GJ when it is receiving Hearsay evidence
- If you learn of GJ abuse, you can correct and supercede.